Supreme Court, U.S.
FILED

011452 MAR - 4 2002

OFFICE OF THE CLERK

No. –

IN THE

Supreme Court of the United States

RICHARD E. SMITH – Petitioner

v.

DEPARTMENT OF JUSTICE – Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The
Federal Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD E. SMITH
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3DP

QUESTIONS PRESENTED FOR REVIEW

1. Did the decision to not restore the employment rights under determination of res judicata deny Richard Smith United States Constitutional due process to statutory protections provided under Title V?

2. Must a federal employer found to have wrongfully terminated a tenured employee because of racial animosity restore that employee to a status he held prior to that termination?

3. Is a statement by the court, not explicitly expressed as a rule or a determination, a finding of fact?

4. Can a federal agency legally refuse to follow statutes and rules regulating employment?

5. Can a federal agency terminate a tenured employee without notice of the specific charge, opportunity of administrative redress, and consideration of mitigating circumstances?

6. Should non compliance with personnel regulations and statutes allow a federal agency to profit from its unlawful termination of an employee?

LIST OF PARTIES

The Caption of the case includes the names of all parties.

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McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995).

Mt. Healthy City Board of ED. v. Doyle, 429 U.S. 274 (1977)

Pollard v. E.I. DuPont DeNemours & Co., 00-763, 532 U.S.____(2001)

Richard E. Smith v. Department of Justice, Initial Decision, United States Merit Systems Protection Board, Central Regional Office, CH-0752-00-0803-I-1 (November 30, 2000)

Richard E. Smith v. Department of Justice, Final Order, United States of America Merit Systems Protection Board, CH-0752-00-0803-I-1 (July 19, 2001)

Richard Smith v. The Drug Enforcement Administration, United States District Court Eastern District of Michigan, Southern Division, 82-4737 (May 3, 1988)

Richard E. Smith v. Department of Justice, United States Court of Appeals for the Federal Circuit, 01-3327 (December 10, 2001)

Richard Smith v. Drug Enforcement Administration, United States District Court Eastern District of Michigan, Southern Division, 82-4737 (April 5, 1990)

STATUTES

5 U.S.C. § 2302

5 U.S.C. § 7511

5 U.S.C. § 7512

5 U.S.C. § 7513

5 U.S.C. § 7701

28 U.S.C. §1254(1)

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Richard Smith respectfully prays that a writ of certiorari issue to review the judgment of the Merit System Protection Board (MSPB) and the United States Court of Appeals.

OPINIONS BELOW

On December 10, 2001 the Court of Appeals for the Federal Circuit affirmed the MSPB decision to deny Smith's request for his return to duty. That decision is noted. The MSPB administrative Initial Decision is noted. The MSPB Final Order is noted. The United States District Court for the Eastern District of Michigan decisions are noted.

JURISDICTION

On December 10, 2001, the Court of Appeals denied Smith's timely petition for return to duty. The MSPB Final Order reviewed by the court of appeals was entered on July 19, 2001. This court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional Provisions:

The Fifth Amendment to the United States Constitution provides, in relevant part:

> nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. Statutory Provisions:

5 U.S.C. § 2302

5 U.S.C. § 7511

5 U.S.C. § 7512

5 U.S.C. § 7513

5 U.S.C. § 7701

STATEMENT OF THE CASE

This action challenges the refusal of the Drug Enforcement Administration (DEA) to restore Richard Smith to employee status after a U.S. District Court in 1988 ruled that he had been racially and wrongfully discharged by DEA. The court further ruled that DEA terminated Richard Smith on racially fabricated charges as a reprisal for filing a racial discrimination complaint. The court ruled that this discharge was in violation of the protections of Title VII and noted that at the time of Smith's discharge, he was a member of a protected class where another court had found that DEA had discriminated against its black agents in promotions, disciplinary actions, and other areas; Civil Case No. 77-0081,U.S. District Court for the District of Columbia. This 1982 decision ordered DEA to stop its discriminatory practices against black Special Agents in denying them promotions and applying disparate disciplinary actions. Smith was fired and denied a promotion because he engaged in a protected act.

As a remedy, Title VII, and this court, requires that an employer make a wrongfully discharged employee administratively whole. This Court has established that restoration requires the employer to return the employee to a condition and status they enjoyed prior to the wrongful act. Smith should have been returned to duty and promoted to the grade denied him by the illegal termination. The DEA, still under a court order to discontinue its practice of racial discrimination against black Special Agents, did

not return Smith to service, change his personnel records to reflect the court's finding of wrongful discharge or change its ordered promotion of Smith to the pay and service grade of GS 13. The DEA's refusal to return Smith to service abused applicable propositions of constitutional law and violates a standing court order issued to protect constitutional rights of black DEA Special Agents.

Factual Background

Smith served for approximately ten years as a Special Agent with the Drug Enforcement Administration. In 1980, he filed a complaint of racial discrimination based on disparaging treatment and retaliation. In 1983, Smith applied for a promotion under an agreement initiated by a federal court order in Segar v. Meese. Several months later, DEA terminated Smith's employment. Subsequent to Smith's termination, an FBI agent who worked with him on his last active investigation, arranged a meeting with a reporter. The FBI agent approached Smith and advised Smith to meet with a Detroit Free Press reporter and discuss the case. The agent assured Smith that the meeting and discussion was permissible because a federal Grand Jury had issued indictments. Smith was not involved with the case investigation at that time. Nor was he in contact with the United States Attorney's office with whom he worked prior to his dismissal. His only contact with officials came through FBI Special Agent Alfred Finch.

In response to Agent Finch's urging and persistence, Smith met with the reporter and discussed the case. Smith provided the reporter with information he gathered over years of investigation of the case. Subsequently, the newspaper published an article on the case. In response, the FBI conducted an investigation of Smith for disclosure of information, information Smith gathered outside the Grand Jury but subsequently presented to them. In 1985, a jury convicted Smith of violation of Rule 6e and a district court judge sentenced him to four months at a federal prison. Special Agent Finch was not investigated nor prosecuted for soliciting and/or aiding in a violation of Rule 6e. Smith served his misdemeanor sentence in 1987.

In 1988, a federal district court heard Smith's wrongful discharge case. The court ruled that DEA had illegally and wrongfully terminated Smith's employment in 1983 and denied him a promotion to GS 13 because he pursued a protected action. DEA claimed that Smith's 1985 criminal record, a misdemeanor conviction, acquired two years after his 1983 termination, barred him from employment with the agency. In 1988 the court noted that DEA employed Special Agents, and supervisory administrative personnel, who plead guilty to misdemeanor charges included in felony indictments to avoid the more serious conviction record. Some, who defrauded the agency of money, suffered only a reduction in grade.

The district judge commented his belief that DEA had grounds to terminate Smith for his violation of Rule 6e and used the date of conviction to limit compensatory damages. However, he did not bar Smith's return to service. The judge ordered DEA to pay Smith compensatory damages comparable to wages he would have earned from 1983 to his conviction in 1985. The judge specifically stated that the money paid to Smith was not backpay but money damages due without interest.

In 1988, subsequent to the trial, Smith filed a workers' compensation claim through the Detroit DEA office for a Post Traumatic Stress Disorder injury. A medical doctor, selected by the agency, identified Smith's injuries as resulting from racial attacks he suffered by DEA supervisors prior to his 1983 termination. Smith listed the pay rate assessed by the court, GS 13, on the required government forms. The claim went through several years of contesting before it was approved in 1990 with a pay grade of GS 12-7. Smith spent several more years attempting to correct the error in his pay grade with the Office of Workers' Compensation Plans (OWCP).

In 1999, Smith discovered that DEA had not changed his personnel records to reflect the 1988 promotion ordered by the district judge. In addition, the OWCP asserted that DEA legally fired Smith in 1983 and also for the 1985 Rule 6e violation conviction.

In response to receipt of the information from the OWCP, Smith contacted DEA and requested his file to be corrected. Smith also requested that DEA issue him retirement credentials as it did other agents with workers' compensation disabilities.

DEA informed Smith that he was not an employee and not retired. The agency claimed that it terminated Smith in 1985 for violation of Rule 6e. Smith advised DEA that it had not fired him for the Rule 6e violation, and that his only termination notice came in 1983 and it was deemed illegal by a federal district court judge.

Smith advised the agency that it did not provide him with the requisite written notice of a proposed termination for specific charges nor the opportunity to respond to those charges. Smith also informed the agency that its summary personnel action denied him of consideration of mitigating circumstances identified as "Douglas Factors."

Smith informed DEA of its obligation to notify him of his return to duty status after he prevailed in his wrongful discharge case in 1988. Smith submitted information and evidence that DEA sent notices to other agents wrongfully discharged without their requesting reinstatement or a court ordering it done.

After initiating a request for a correction of his records, Smith discovered that DEA continued to ignore the 1982 court mandate to cease and

desist its discriminatory employment practices. Smith contacted the federal court-ordered monitoring committee and notified them of DEA's misconduct in his personnel matter.

In 1982, a federal district court found that DEA systematically discriminated against black Special Agents in regards to hiring practices, their career promotions, and disciplinary actions taken against them. The judge ordered the agency to implement corrective actions and distribute backpay to the affected class members. Initially, DEA contested the court order and refused to accept the court's decision. Subsequent to hearings, DEA acquiesced to the ordered administrative changes and agreed to eliminate disparaging hiring, promotion, and disciplinary practices. Following a brief period of compliance, DEA re-instituted its discriminatory practices and caused the Segar, et al class action case to remain open and under supervision of the federal court.

Subsequent to establishing its resistance to the court's decrees, DEA advised Smith that DEA maintained a position that the agency fired him for his 1985 act and that his pay grade remained GS 12 step 7. Smith filed a complaint with the Merit Systems Protection Board (MSPB) stating that DEA failed to follow statutes in Title V that required the agency to correct errant personnel records and to give tenured employees a written notice of a proposed adverse action. Such a proposal required DEA to issue specified charges for termination and include any consideration of mitigating circumstances known as the "Douglas Factors."

DEA responded that the 1988 wrongful discharge decision resolved the issues of Smith's employment. The agency claimed that the judge awarded Smith damages and barred his return to duty. DEA also proclaimed that time limits barred Smith from consideration for return to duty. As noted above with the Segar case, DEA has demonstrated a tactic to resist compliance with statutes and court orders as a method to delay and deny justice to its black Special Agents. Time limits that bar Smith's return are not relevant to this issue. The burden of implementing a return to work rested with the agency. However, DEA failed to comply with its employment standards and practice of notifying employees to return to duty after a finding of wrongful discharge along with notice of changes to their personnel records.

In Smith's case, the agency arbitrarily selected self-serving elements in the district court's decision to deny Smith's employment rights. The agency claimed that the judge's expressions of DEA having grounds to propose Smith's termination constituted an implied court order, and the finding that DEA wrongfully terminated Smith did not require them to correct his personnel records. DEA actions also expressed a belief that the district court order did not require them to promote Smith as of 1983. This Court has declared that correction of discriminatory employment policies should compensate the injured worker and "deter employers from engaging in such discrimination."[1]

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[1]McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995).

Smith argued that the 1988 case established that DEA wrongfully and illegally terminated Smith's employment. He noted that the judge did not bar Smith's return to duty, rather he stated that he felt that the agency had reason to fire Smith for the 1985 disclosure. That statement left the decision to terminate Smith, as stipulated by statute, with the agency and governed by applicable procedures.

In its argument of res judicata, DEA claimed, counter to the rulings of this court and without reliance on Smith's personnel records, the compensatory damage award alone made Smith whole. The United States Supreme Court has ruled that enforcement of Title VII cases must be vigorous and that wrongfully discharged persons must be made whole. Such relief would constitute denied promotions, payment of lost taxable salary income, and access to employee benefits. DEA did not change Smith's pay grade from GS 12 to GS 13 as ordered in 1988, nor compensate Smith, a Segar class member, for a U.S. District Court ordered back pay to compensate for service from 1983 to 1985. Those years of non payment of back pay came as a result of the illegal 1983 termination. DEA failed to report Smith as returned to service and due compensation for the ordered backpay in Segar v. Meese to the court monitoring the Segar case.

DEA claimed that other than a transcript from the 1988 trial, it lost Smith's personnel records. However, without access to Smith's employment

records, DEA presented conclusions of his employment without documentation to establish a factual basis for the agency position. The loss of Smith's personnel file aids DEA's concealment of evidence that it never corrected Smith's employment record regarding the 1983 wrongful discharge, refused to promote him to a GS 13 pay grade, or proposed a termination for a 1985 charge.

Significantly, a new charge for an adverse action would require a notice that the agency considered mitigating circumstances, Douglas Factors, in meting out punishment to Smith. A termination of Smith's employment for a violation of Rule 6e extended beyond a remote possibility. DEA's legitimacy to fire Smith dissipated with two major considerations: the agency expunging the fabricated charges for his 1983 discharge from his record, and recognition of facts of much less severe punishment given to the Administrator for his Rule 6e violation.

Acting without examination of personnel records, DEA released information to other agencies, OWCP and MSPB, that it terminated Smith for acts alleged in the 1983 termination as well as the 1985 violation of Rule 6e. Through its refusal to reconstruct Smith to as near a pristine administrative condition as he held prior to the 1983 wrongful discharge, DEA has profited from its illegality and continues to unjustly punish Smith.

DEA did not present charges to terminate Smith for the 1985 violation of Rule 6e. The agency sought prosecution and incarceration of Smith when a similar act, committed by the DEA

Administrator during the relatively same time period and reported in the New York Times, went excused and unpunished. The decision to treat the Administrator's Rule 6e violation without termination of employment established a pattern of discipline denied Smith. Under the provisions of Title V statutes and application of the Douglas Factors, Smith's prior excellent work record would have been included in a decision along with the agency's recognition and acceptance of its leader's similar act. With the inclusion of those factors, DEA lacked sufficient grounds to terminate Smith's employment.

In 2001, a Merit Systems Protection Board administrative judge issued an initial decision that stated that the trial judge in 1988 found racial discrimination but that DEA properly terminated Smith for the charges issued in 1983. He also opined that the 1988 decision barred Smith from employment with DEA. The administrative judge ruled that the district court awarded Smith damages for discrimination suffered, not wrongful discharge. Smith petitioned the MSPB for reconsideration of the administrative judge's decision. The Board upheld the administrative judge's decision in its final order.

Smith appealed the Board's final order to the United States Court of Appeals for the Federal Circuit. On December 11, 2001, the Court of Appeals affirmed that res judicata barred Smith's claim. The court corrected the administrative judge in part. It stated that DEA did wrongfully discharge Smith in 1983. However, the court affirmed the administrative judge's ruling that

the trial judge did specifically bar Smith's return to duty.

In these circumstances, the United States Supreme Court established that an order barring a return-to-work must be based on proof that a prohibited act must obviously demonstrate that the employer would have grounds to terminate the employee and make the return to duty a waste of time and effort.[2] The proof required by this court is not evident in this case. It is not specifically stated in the decisions of the MSPB or the Court of Appeals. With regards to Smith, neither body considered the proof demanded by this court to bar his return to duty. The misconduct of the DEA Administrator, for the same violation of law, did not result in his dismissal or receipt of a lesser punitive action. The agency clearly did not consider the Administrator's release of Grand Jury material **prior** to indictments an offense warranting a termination

The appeals court erred in its reading of the district court judge's order. The district judge only stated that he found DEA had grounds to terminate Smith but he specifically did not bar his return to service. Under the guidelines of the after-acquired evidence doctrine established by the Supreme Court in Mt. Healthy City Board of ED. v. Doyle, 429 U.S. 274 (1977) and later incorporated in McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995), which included consideration of the mitigating effects of

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[2] McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995)

the "Douglas Factors," the district judge obviously recognized his limitations on the matter of reinstatement. DEA's prior decision regarding the Administrator's punishment for violation of Rule 6e prevented the judge from issuing an order to bar Smith's return to duty. He acted to protect Smith's federal employment in view of legal test established by this court. In the district court's decision, the implication regarding an adverse personnel action encompassed the effects of the Douglas Factors which act as a protection within federal employment. "A district court may not deny reinstatement based on after-acquired evidence of misconduct if the employer could not have lawfully fired the employee for that conduct."[3] The fact that the DEA Administrator violated the same Rule 6e without having his employment terminated established a standard for mitigating punishment for violation of Rule 6e. In Smith v. Department of Justice, the district court judge heard testimony of the Administrator's 6e violation. That testimony demonstrated that DEA lacked requisite factors of compelling evidence to establish grounds for a discharge based on after-acquired evidence of misconduct.[4]

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[3] United States Court of Appeals For The District of Columbia Circuit, March 15, 1996, No. 95-5087, Dian L. Castle v. Robert E. Rubin, Secretary, Department of the Treasury, Appeal from the United States District Court for the District of Columbia, (93cv2643)

[4] McKennon v Nashville Banner Publishing Co., 115 S. Ct. 879 (1995). The Court held that reinstatement is inequitable and pointless when after-acquired evidence of misconduct demonstrated a severity that the employer would have terminated the employee for those charges. The severity of the violation is implied to be such that subjectivity of the severity is minimal. The charge used to

DEA never appealed the district court's 1988 decision. It accepted the court's decision that the agency, motivated by a racial animosity, wrongfully terminated Smith and denied him a promotion to Grade 13 in 1983. Unlike Nashville Banner Publishing Co., DEA did not initiate a new adverse personnel action against Smith. The agency did not send him a written notice of corrections to his personnel record to reflect the court's findings on the 1983 termination, nor did it submit a written notice of a personnel action regarding the 1985 act.

DEA has acted without remorse or redemption for Smith's illegal termination. Its refusal to follow administrative procedures has denied Smith administrative reconstruction and rendering him whole. Nor has court rulings acted as a deterrent to DEA's illegal acts of employment discrimination perpetrated through its misuse of personnel actions. This unaccountability has allowed DEA to punish individuals unjustly to further the designs, personal or racial, of managers and administrators.

Clarity of the district judge's 1988 decision came in 1990 when he emphatically stated that the money awarded Smith was not relief in the form of backpay. The court identified the compensation, with extreme efforts, as money awarded as compensatory damages, not backpay. In addition, DEA acknowledged the

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base the termination should not promote selective prosecution of personnel action to establish severity. Mitigation as established in Douglas v. Veterans Administration must be applied in governing the punishment.

type of award in its disbursement. Unlike in the Segar award of backpay, DEA did not deduct taxes nor issue a form W2 to Smith to identify the award as taxable income. Again, without defining the award as wages and taxable, the district court identified its award of damages as compensatory and not a replacement for a reinstatement remedy, front pay or backpay.[5]

In Pollard v. DuPont DeNemours, the U.S. Supreme Court distinguished front pay as a remedy for reinstatement and separate in nature from compensatory damages. The Court also noted in Pollard that compensatory damages will not "include backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964." The Court related front pay to "a type of relief authorized under § 706(g)" and excluded it from the definition of compensatory damages. This court clearly noted that front pay constituted an award in lieu of reinstatement. In Smith's case, the court awarded only compensatory damages; backpay and front pay were not introduced into its ruling that DEA wrongfully terminated Smith's employment. As such, the monetary award did not make Smith whole. The order and award gave DEA notice that it wrongfully terminated Smith and had an obligation to return him to service, correct his personnel record to remove the 1983 termination, and promote him to the GS13 grade the agency wrongfully denied him in 1983.

Subsequent to the finding of wrongful discharge, DEA received notice that Smith was undergoing

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[5] Pollard v. E.I. DuPont DeNemours & Co., No. 00-763.

treatment for a Post Traumatic Stress Disorder (PTSD) injury caused by racial harassment at its Detroit office. In response, the agency slithered away to avoid its responsibilities and to again wrongfully deny Smith employment. DEA acted to retaliate for its 1988 loss in the district court. Much like in the Segar case, DEA refused to accept a legal decision it disagreed with and sought to punish employees who seek justice.

In addition, DEA's 1983 wrongful discharge placed Smith in a situation or hazard to him living in an environment that directly contributed to his 1985 disclosure. Had Smith remained in his position with DEA, he would not have been in a position to be manipulated by FBI Special Agent Finch. Prior to the wrongful discharge, Smith worked closely with the United States Attorney's office and received advice on grand jury legal questions. With continued access to an AUSA, he would not have faced or have been challenged by the problems initiated by Agent Finch.

In Kenneth D. Martin v. Department of the Air Force, United States Court of Appeals for the Federal Circuit, 98-3401, the court noted that a disability that arises from the unlawful discharge and is not a usual incident of the hazards of living generally, the period of disability will not be excluded from backpay.[6] As such, Smith suffering from PTSD inflicted by DEA, suffered additional injury by the illegal acts of Special Agent Finch. The illegal solicitation by Special

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[6] American Mfg. Co. of Tex., 167 NLRB 520, 522 (1967).

Agent Finch for disclosure of material, of which the FBI agent knew to be related to the Grand Jury, was not punished with termination of his employment. In fact, Finch continued his career and received several promotions.

As noted above, the punishment sought of Smith for the 1985 disclosure exceeds the personnel actions taken by the United States Justice Department and DEA against the DEA Administrator and FBI Special Agent Finch for violation of Rule 6e. In addition, the intense prohibited discrimination that culminated in an illegal adverse action in 1983 placed Smith in a situation that rendered him fragile and directly contributed to the disclosure.

Error in the rulings of the MSPB administrative judge and affirmed by the federal appeals court denied Smith the protections granted under the Constitution and Title V as a tenured employee. As such, Smith was illegally deprived of his property and protection of the laws.

REASONS FOR GRANTING THE PETITION

The Court of Appeals for the Federal Circuit relied on an argument that departs from a course of judicial direction established by the Supreme Court of the United States regarding its after-acquired evidence doctrine.

The December 10, 2001 decision by the court of appeals relied on an argument not expressed by the District Court for the Eastern District of Michigan, Southern Division and counter to the rulings of this court. As such, the court of appeals affirmed a decision by an administrative judge and the MSPB that seized Smith's employment property without due process.

Title V of the United States Code establishes tenured federal employees with statutory property rights to their employment. The decisions of the MSPB and the court of appeals failed to recognize Smith's legal attachment to his property. The MSPB's and the court of appeals' decisions did not consider the statutory protections of Smith's employment rights to written charges of misconduct. The appeals court's finding to affirm the MSPB decision denied Smith his protection established in Douglas v. The Veterans' Administration with regards to mitigation of punishment for employee misconduct. In deciding the effects of the "Douglas Factors," the Supreme Court sought to establish a level playing field and prevent disparate disciplinary actions among employees with equal punishment for similar offenses.

In addition, DEA did not rely on the district court's comments to punish officials who were identified as creators of false documents and untrue accusatory statements used to terminate Smith's employment in 1983. DEA did not seek felony prosecution of those officials for filing false reports or discipline them for Smith's racially motivated illegal discharge. Because the judge's expressions of DEA misconduct adversely affected supervisors who pursued an administrative objective, Smith's discharge, the agency did not consider them a ruling of fact. DEA sought to minimize its illegal acts through self-serving recognition of the court's admonishments as an administrative option available for the agency's pursuit of felony and/or administrative charges against officials who acted illegally.

Within those perceived options, DEA elected not to punish officials who orchestrated illegal acts against Smith. Because the court did not explicitly demand that the agency charge them, DEA considered the court's words as non-binding.

In its affirmation, the court of appeals considered as a judgment a non explicit comment by a district court judge. This application of an implied decree allowed the DEA, MSPB, and the court of appeals to tailor their decision not to return Smith to his employment beyond the parameters established by the Supreme Court.

Clearly, the district court recognized an opportunity to address DEA's ability to discipline Smith for violation of Rule 6e. However, the district judge clearly did not express a decision to bar Smith's return. Absent an order to deny Smith's return, DEA faced a legal obligation to return him to duty and administratively make him as whole an employee as he was prior to his illegal termination in 1983. If the agency felt that charges regarding the 1985 act would result in a termination of employment it was not barred from giving Smith a written proposal for a new adverse act. However, the administrative decision not to punish the Administrator would have eliminated the possibility of Smith's separation from service for that charge.

Allowing the decision to affirm the prevention of Smith's return to work negates the statutory requirements of Title V that protects tenured federal employees from illegal and arbitrary employment practices. Without these protections, employees wrongfully terminated and exonerated of charges of misconduct must petition the offending agency for reinstatement to their position and beg that agency to correct itself and make them whole. This process flows against the design and intent of laws established to end discrimination and rewards the illegal act with a de facto endorsement of the initial wrongful discharge. As a result, an employee would remain separated from service and dependent on the generosity of those who acted illegally to dispense follow-up justice.

In addition, DEA failed to complete its obligation to make Smith whole with only an award of compensatory damages. This court noted in Albemarle Paper Co. et al. v. Moody et al., 422 U.S. 405:

> Backpay has an obvious connection with this purpose. If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst [422 U.S. 405, 418] which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." United States v. N. L. Industries, Inc., 479 F.2d 354, 379 (CA8 1973).
>
> It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to "secur[e] complete

justice," Brown v. Swann, 10 Pet. 497, 503 (1836); see also Porter v. Warner Holding Co., 328 U.S. 395, 397 -398 (1946). "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." Bell v. Hood, 327 U.S. 678, 684 (1946). Title VII deals with legal injuries of an economic character occasioned by racial or other antiminority discrimination. The terms "complete justice" and "necessary relief" have acquired a clear meaning in such circumstances. Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States, 380 U.S. 145, 154 (1965). And where a legal injury is of an economic character.

"[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The

> injured party is to be placed, as near as may be, in [422 U.S. 405, 419] the situation he would have occupied if the wrong had not been committed." Wicker v. Hoppock, 6 Wall. 94, 99 (1867).

Smith was not placed near to his condition prior to his illegal termination, and that failure rests solely with DEA. The agency deliberately refused to correct Smith's personnel record regarding the 1983 termination and it refused to correct Smith's employment grade of service as ordered by the court. As a result, Smith suffered financial losses with his Segar settlement, two years of a backpay award, and his Workers' Compensation entitlement at a rate less than the ordered promotion.

DEA's refusal to return Smith to service violated its own administrative processes and established legal doctrine provided in Title V. The agency denied Smith his entitled access to statutory and constitutional protections. As such, Smith was not made whole and was further injured by the agency's continued wrongful employment acts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Richard B. Smith

Date: 3-1-2002

Supreme Court, U.S.
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011452 MAR - 4 2002

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APPENDIX

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APPENDIX
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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT DATED
DECEMBER 10, 2001 3

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RICHARD E. SMITH,
Appellant,

DOCKET NUMBER
CH-0752-00-0803-I-1

v.

DEPARTMENT OF JUSTICE,
Agency.

DATE: JUL 19 2001

Richard E. Smith, Southfield, Michigan, pro se.

J. Michael Sawyers, Esquire, Alexandria, Virginia, for the agency.

BEFORE

Beth S. Slavet, Chairman
Barbara J. Sapin, Vice Chairman
Susanne T. Marshall, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not

available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. This disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

01-3327

RICHARD E. SMITH,
Petitioner,

v.

DEPARTMENT OF JUSTICE,
Respondent.

DECIDED: December 10, 2001

Before BRYSON, LINN, and DYK, Circuit Judges.

PER CURIAM.

DECISION

Petitioner Richard E. Smith seeks review of the decision of the Merit Systems Protection Board, No. CH-0752-00-0803-I-1, dismissing his appeal. We affirm.

BACKGROUND

On November 26, 1973, the Bureau of Narcotics and Dangerous Drugs ("BNDD"), the predecessor of the Drug Enforcement Administration ("DEA"), hired Mr. Smith as a criminal investigator in its Detroit field office. In December 1982, citing unfair treatment because of his race, Mr. Smith filed a discrimination action in federal district court under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16. Shortly after the lawsuit was filed, Mr. Smith's supervisor gave him low ratings in an assessment of his potential for promotion. Those ratings were in contrast to the high ratings he had received throughout his tenure with the BNDD and the DEA. Subsequently, on March 16, 1983, Mr. Smith received a notice of proposed dismissal citing various transgressions. Mr. Smith was terminated effective April 22, 1983. He did not appeal that decision to the MSPB.

Several months after his removal, Mr.

Smith disclosed to a newspaper reporter grand jury material pertaining to an ongoing DEA investigation, in violation of Federal Rule of Criminal Procedure 6(e). Mr. Smith was subsequently charged with contempt of court based on that violation. He was convicted of that offense on September 19, 1985, and given a four-month prison sentence, which he served in 1987.

In Mr. Smith's Title VII lawsuit, the district court ruled that the DEA had discriminated against Mr. Smith based on his race and had fired him in retaliation for his legal action against the agency. The court awarded Mr. Smith damages for the time period up to the date of his conviction. At that point, the court concluded, it would have been reasonable for the DEA to terminate Mr. Smith. The district court did not require the agency to reinstate Mr. Smith. Mr. Smith did not appeal that decision.

Eleven years later, Mr. Smith sought a clarification of his status from the DEA. In correspondence with the agency, he claimed that he should have been reinstated to active duty following the district court's 1988 ruling. Accordingly, he asked the agency for back pay and reestablishment of benefits. The DEA replied that it had fully complied with the court order by paying the amount of damages the court had awarded.

On August 29, 2000, Mr. Smith appealed to the MSPB from what he characterized as the agency's "fail[ure] to reinstate [his] employment" after the district court's 1988 ruling. An administrative judge who was assigned to the case dismissed Mr. Smith's appeal as untimely and barred by res judicata. The administrative judge concluded that Mr. Smith's August 2000 appeal was a "patently untimely" effort to contest his 1983 termination and that he had made no showing that he had exercised due diligence in bringing his appeal. In addition, the administrative judge ruled that Mr. Smith was barred by res judicata from relitigating the propriety of his 1983 termination, which the district court had held to be lawful as of the date of Mr. Smith's conviction. Because there was no other adverse agency action from which Mr. Smith had a right of appeal, the administrative judge dismissed the appeal.

The full board denied Mr. Smith's petition for review, and this appeal followed.

DISCUSSION

Mr. Smith characterizes his appeal as taken from the DEA's refusal in August 2000 to reinstate him and provide him with back pay and benefits. The Board, however, has limited appellate jurisdiction, and a refusal to reinstate an employee is not one of the denominated adverse agency actions from

which an appeal may be taken to the Board. See 5 U.S.C. § 7512 (Board's appellate jurisdiction over agency actions is limited to removals, suspensions for more than 14 days, reductions in grade or pay, and furloughs of 30 days or more); Cruz v. Dep't of the Navy, 934 F.2d 1240, 1243 (Fed. Cir. 1991) (en banc). Accordingly, to the extent that Mr. Smith seeks to appeal from the agency's refusal to reinstate him, the Board lacked jurisdiction over his appeal.

The administrative judge noted that the only adverse agency action from which Mr. Smith could appeal was his 1983 removal. To the extent that his August 2000 appeal could be treated as an appeal from that 1983 agency action, the administrative judge held that the appeal was untimely. Given the extraordinary delay and Mr. Smith's failure to offer any excuse for the delay, the administrative judge's ruling on that issue cannot be regarded as an abuse of discretion.

The administrative judge was also correct in ruling that the relief Mr. Smith seeks is barred as a legal matter by res judicata. A necessary element of the district court's judgment granting back pay only to the date of Mr. Smith's conviction, and the court's failure to require that he be reinstated, was the court's conclusion that, following his conviction, Mr. Smith had no further right to reinstatement to his position

with the DEA. Mr. Smith did not appeal that adverse aspect of the district court's judgment, and he is therefore barred by res judicata from obtaining an administrative order granting reinstatement, back pay, and benefits for the period following the date of his conviction.